(2)

No. 03-811

In the Supreme Court of the United States

PETER J. MINIEL,

Petitioner,

v.

DOUG DRETKE, DIRECTOR
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Gregory R. Merz
Counsel of Record
Gray, Plant, Mooty, Mooty & Bennett, P.A.
500 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
(612) 632-3000
(612) 632-4444 (fax)

Attorney for Petitioner,
Peter J. Miniel

2004 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

TABLE OF CONTENTS

INTRODUCTION 1

DISCUSSION 1

I. THE FIFTH CIRCUIT'S CONCLUSION THAT MR. MINIEL'S TRIAL COUNSEL PERFORMED A CONSTITUTIONALLY SUFFICIENT INVESTIGATION OF POTENTIAL MITIGATING EVIDENCE CONSTITUTED AN UNREASONABLE APPLICATION OF THIS COURT'S DECISIONS IN *WIGGINS* AND *WILLIAMS* 1

II. THE LOWER COURT FAILED TO CONSIDER WHETHER THERE WAS A REASONABLE PROBABILITY THAT THE OMITTED MITIGATING EVIDENCE WAS SUCH THAT IT WOULD HAVE CAUSED ONE JUROR TO ANSWER ONE OF THE TWO SPECIAL ISSUE QUESTIONS IN THE NEGATIVE 7

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Alexander v. McCotter, 725 F.2d 595 (5th Cir. 1985)..... 2

Miller-El v. Cockrell, 537 U.S. 322, 123 S. Ct. 1029 (2003). 1

Perry v. Lynaugh, 492 U.S. 302 (1989) 9

United States v. Forster, 128 F.3d 946 (6th Cir. 1997)..... 3

United States v. Olaniyi-Oke, 199 F.3d 767 (5th Cir. 1999)... 3

Wiggins v. Smith,
___ U.S. ___, 123 S. Ct. 2527 (2003).....*passim*

Williams v. Taylor, 529 U.S. 362 (2000).....6, 7, 8, 9

INTRODUCTION

Petitioner Peter J. Miniel respectfully submits this reply brief in support of his petition for writ of certiorari. For the reasons discussed in Mr. Miniel's petition and in this reply, reasonable jurists would find the district court's denial of his ineffective assistance of counsel claim debatable or wrong. *See Miller-El v. Cockrell*, 537 U.S. 322, 123 S. Ct. 1029 (2003). Accordingly, the lower court's denial of Mr. Miniel's request for Certificate of Appealability was in error and should be reversed.

DISCUSSION

I. THE FIFTH CIRCUIT'S CONCLUSION THAT MR. MINIEL'S TRIAL COUNSEL PERFORMED A CONSTITUTIONALLY SUFFICIENT INVESTIGATION OF POTENTIAL MITIGATING EVIDENCE CONSTITUTED AN UNREASONABLE APPLICATION OF THIS COURT'S DECISIONS IN *WIGGINS* AND *WILLIAMS*

Affidavits offered in support of Mr. Miniel's petition for post-conviction relief detail powerful mitigating evidence that Mr. Miniel's trial counsel failed to discover because he failed to undertake a reasonably adequate investigation. *See* Petitioner's Appendix at A-113 – A-151. The State incorrectly contends that Mr. Miniel failed to sufficiently establish that the various affiants who support his claim for post-conviction relief would have been willing to testify on his behalf and that this claimed failure, by itself, is a sufficient basis for denying Mr. Miniel's petition. Respondent's Brief in Opposition ("Opposition") at 17-18. The State made a similar argument to the Fifth Circuit, but

that court did not adopt it in support of its decision. In fact, the State's contention is wholly unsupported by the record.

The affidavits submitted by Mr. Miniel show a family that was concerned for Mr. Miniel's well-being and that was ready, willing and able to assist in Mr. Miniel's defense, but never got the chance because of trial counsel's ineffectiveness. Indeed, one of Mr. Miniel's sisters states specifically that she attempted to contact Mr. Miniel's trial counsel because she wanted to help in any way she could. Appendix at A-127. Another sister states that she attempted to contact Mr. Miniel's trial counsel several times but received no response. Appendix at A-144. Mr. Miniel's mother, father, and another sister spent a month in Houston at the time of Mr. Miniel's trial, but their repeated efforts to find out if there was any way in which they could provide assistance were rebuffed by Mr. Miniel's trial counsel. *See, e.g.,* Appendix at A-150.

Cases cited by the State on this point are inapposite. *Alexander v. McCotter*, 725 F.2d 595 (5th Cir. 1985), is the only one of those cases to address the issue in the context of a claim that a failure to investigate possible mitigating evidence constituted ineffective assistance of counsel. There the court rejected the claim based on its determination that the petitioner had failed to offer any detail regarding the identities of the claimed omitted witnesses or what the testimony of such witnesses might reveal. Here, in contrast, Mr. Miniel has done far more than refer generally to possible mitigating evidence. Rather, he has provided affidavits of family members who should have been, at the very least, thoroughly interviewed in connection with developing an effective mitigation case. These affidavits are rich with detail regarding the mitigating testimony that those witnesses could have provided.[1]

---

[1] The two other cases cited by the State deal, not with a claim for post-conviction relief, but a denial of a request for trial continuance to

However, even assuming, *arguendo*, that the members of Mr. Miniel's family, who have now submitted detailed affidavits, would not have been willing to testify at trial, this plainly does not relieve counsel of his duty to thoroughly investigate possible investigating evidence. As the Court confirmed in *Wiggins v. Smith*, ___ U.S. ___, 123 S. Ct. 2527 (2003), "In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." 123 S. Ct. at 2938. Had Mr. Miniel's trial counsel adequately interviewed Mr. Miniel's family, he would have learned about Mr. Miniel's head injuries, his long time alcohol and drug use, his difficulties in school, and the extreme physical and emotional abuse that he had experienced. Knowing these facts, reasonable counsel would have been led to investigate further by engaging an expert to examine Mr. Miniel and determine what impact these circumstances may have had on his mental functioning. Such an examination would have revealed, in turn, powerful mitigating evidence of Mr. Miniel's brain impairment and mental disabilities. *See* App. at A-97-A - 112.

The State and the lower courts relied heavily on the report of Dr. Brown, who, at the request of the prosecution,

---

allow time to locate allegedly missing witnesses. In *United States v. Olaniyi-Oke*, 199 F.3d 767 (5th Cir. 1999), the defendant was seeking a continuance to allow him an opportunity to call a witness who, he said, would testify that another person had committed the crime. The court, however, found that the testimony that the defendant claimed the witness would provide was directly contradicted by a prior sworn statement by the witness. It was on this basis that the court found that the defendant had failed to show that the witness was able and willing to testify.

In *United States v. Forster*, 128 F.3d 946 (6th Cir. 1997), the defendant sought a continuance on the grounds that the government had acted improperly by intimidating a potential witness. The court did not resolve this claim because it granted relief on other grounds.

performed a court-ordered evaluation of Mr. Miniel to determine his competency to stand trial, as justifying counsel's failure to perform an investigation of Mr. Miniel's mental condition. The Fifth Circuit stated, "Miniel's trial counsel, Mr. Fred Heacock, explains in his affidavit that Mr. Miniel was tested by the State's psychologist." Appendix at A-21. This statement, however, is simply incorrect. Mr. Heacock's affidavit does not once mention Dr. Brown's evaluation. Appendix at A-152 – A-157. Mr. Miniel's trial counsel does not, in fact, claim that he ever reviewed Dr. Brown's report, much less that he relied on it as a basis for concluding that investigation of Mr. Miniel's mental functioning would be futile.[2] Mr. Miniel's trial counsel states only that he "never suspected" that Mr. Miniel suffered from any mental health conditions. Appendix at A-153. Counsel does not offer any professional evaluation or expert opinion in support for his conclusions. Such off-the-cuff, inexpert impressions cannot stand as a constitutionally sufficient reason for not conducting further investigation.

Mr. Miniel's trial counsel's summary, unsupported conclusion that Mr. Miniel lacked "warm feelings" for Mr. Miniel did not constitute a reasonably adequate investigation. The question was not whether Mr. Miniel's family had warm feelings, but whether there was evidence that they could provide that might cause a juror to answer "no" to one of the special issue questions. Although a reasonable counsel, faced with a family so cold and unfeeling as the one portrayed here, would have investigated the possibility of a history of child abuse, Mr. Miniel's trial counsel now acknowledges that he cannot recall whether he inquired about the possibility of

---

[2] Indeed, Dr. Brown's report reflects that Mr. Miniel described to him a significant history of alcohol and drug abuse, facts of which Mr. Miniel's trial counsel was apparently unaware. Compare Tr. at 34 – 35 with Appendix at A-153.

child abuse. Appendix at A-153.[3] Thus, even taking counsel's affidavit at face value, the disturbing characterization that he relates of Mr. Miniel's family should only have served to spur additional investigation.

Moreover, even assuming that there was evidence that Mr. Miniel's trial counsel had relied on Dr. Brown's competency evaluation as a basis for foregoing a psychological evaluation for purposes of investigating possible mitigating evidence, such reliance would have been patently unreasonable. Dr. Brown's report describes the narrow scope of that evaluation, specifically stating that Mr. Miniel "was seen for competency evaluation . . . pursuant to court order." Tr. at 34. The purpose of Dr. Brown's report was not to determine the existence of mitigating evidence, nor could it reasonably be considered to substitute for an evaluation for that purpose. Thus, although Dr. Brown pronounced Mr. Miniel competent to stand trial, this could not reasonably satisfy counsel's obligation to thoroughly investigate possible mitigating evidence. There plainly are a number of mental conditions that, although they might not render a defendant incompetent to stand trial, would still be highly relevant to the jury's consideration of appropriate punishment.

The State, in opposition to the petition, notes that the lower court found that Dr. Brown's report "did not reveal any history of physical or emotional abuse." Opposition at 16. Indeed, the report is wholly silent on this issue – which would be an important element of any reasonably thorough investigation of a potential mitigation case. There is no evidence that Dr. Brown ever asked Mr. Miniel about a history of abuse, nor would such an inquiry have necessarily

---

[3] Although Mr. Miniel's counsel states, in a general way, that he talked with members of Mr. Miniel's family, the only family member that he is able to specifically identify as someone he talked to was Mr. Miniel's father, who was also Mr. Miniel's abuser.

been relevant to the purpose of Mr. Brown's evaluation. Certainly Dr. Brown's silence on the issue of prior abuse could not be reasonably taken by Mr. Miniel's trial counsel as an adequate basis for ruling out the possibility and foregoing any investigation of the issue.

Had Mr. Miniel's counsel performed a constitutionally adequate investigation, then he could have made strategic choices about what mitigating evidence to present. However, a wholesale failure to investigate cannot be justified as a strategic choice. *See Wiggins*, 123 S. Ct. at 2541 ("A decision not to investigate this 'must be assessed for reasonableness in all circumstances,'" *quoting Strickland*, 466 U.S. at 691, 104 S. Ct. at 2052). Rather than performing the investigation necessary to make strategic choices about Mr. Miniel's defense, Mr. Miniel's trial counsel simply put on the mitigating evidence, such as it was, that he had readily at hand. None of the three witnesses at trial who were called on Mr. Miniel's behalf knew anything about Mr. Miniel's life before the crime. Mr. Miniel's trial counsel first spoke with two of those witnesses only the day before they testified. 28 S.F. at 94, 104. *Cf. Williams v. Taylor*, 529 U.S. 362, 395 (2000) ("The record establishes that counsel did not begin to prepare for [the penalty] phase of the proceeding until a week before the trial.").

Mr. Miniel's trial counsel did even less than the investigation found to be constitutionally ineffective in *Wiggins*. Wiggins' counsel reviewed a presentence investigation report and social service records relating to his client and also retained a psychologist to evaluate his client's mental functioning. Mr. Miniel's trial counsel did neither of these things. This is not a case, as the State asserts, where Mr. Miniel is claiming that his counsel was obligated to "shop for psychological impairment evidence." In fact, Mr. Miniel's trial counsel made no effort at all to investigate his client's mental functioning as a source of mitigating evidence. Further, to the extent that counsel could be said to have made

a decision not to undertake such an investigation, he did so without a reasonable basis, contrary to *Wiggins*.

II. THE LOWER COURT FAILED TO CONSIDER WHETHER THERE WAS A REASONABLE PROBABILITY THAT THE OMITTED MITIGATING EVIDENCE WAS SUCH THAT IT WOULD HAVE CAUSED ONE JUROR TO ANSWER ONE OF THE TWO SPECIAL ISSUE QUESTIONS IN THE NEGATIVE

As set forth in Mr. Miniel's petition, the proper prejudice analysis asks whether there is a reasonable probability that the omitted evidence, together with the evidence that was presented, would have caused one juror to change his or her vote on one of the special issue questions. The State does not dispute that this is the proper test. Indeed, one "no" vote by one juror to one of the two special issue questions would have been enough to change the outcome of the case.

The State argues, and the lower court found, that Mr. Miniel has failed to show prejudice resulting from his trial counsel's failure to investigate and present mitigating evidence because the additional mitigating evidence, had it been presented: 1) would have been "overwhelmed" by other evidence of his future dangerousness, including evidence of Mr. Miniel's past violent behavior; and 2) was not "unequivocally mitigating." The Fifth Circuit's reasoning is contrary to this Court's decisions in *Wiggins* and *Williams*. Indeed, if this were the law, the Court would not have found prejudice in either *Wiggins* or *Williams*.

In *Williams*, this Court found that evidence of Williams' history of childhood abuse and borderline mental retardation, together with evidence of remorse and good behavior while in prison – which was very similar to the mitigating evidence in this case – "might well have

influenced the jury's appraisal of his moral culpability," even if it was not sufficient to overcome a finding of future dangerousness. 529 U.S. at 398. Here, the Fifth Circuit never considered whether there was a reasonable probability the mitigating evidence, including the evidence that was presented and the evidence that was omitted, would have influenced even one juror's appraisal of Mr. Miniel's moral culpability. Thus, in evaluating prejudice, the Fifth Circuit failed to address the full potential impact of the evidence, focusing exclusively on the issue of future dangerousness while ignoring the effect of the evidence on the jurors' consideration of whether Mr. Miniel's conduct was "deliberate," for purposes of the second special issue question.

However, the Fifth Circuit was wrong even in its analysis of the relationship of the mitigating evidence to the issue of future dangerousness. The lower court found that the omitted evidence would not have made any difference because it would have been overwhelmed by evidence of Mr. Miniel's past violent conduct. However, in *Williams*, the defendant, unlike Mr. Miniel, had an extensive history of prior violent conduct, including savagely beating an elderly woman, stealing two cars, setting fire to a house, stabbing a man during a robbery, choking two inmates and breaking a fellow prisoner's jaw. 529 U.S. at 418. Yet the Court did not find that this violent history was so "overwhelming" as to prevent a finding of prejudice arising from counsel's failure to offer mitigating evidence very similar to the evidence at issue here.

Nor can the prejudice arising from the omission of this evidence be denied on the ground that the evidence is not "unequivocally mitigating." In *Williams*, this Court similarly observed that "not all of the additional evidence was favorable to Williams." 529 U.S. at 396. Yet that fact did not lead the Court to conclude that the omission of mitigating evidence did not cause prejudice to Williams. Indeed,

mitigating evidence at issue in *Williams* (severe physical abuse as a child, repeated head injuries, possible organic mental impairments) and *Wiggins* (sexual abuse as a child) was no less "double-edged" than the very similar mitigating evidence that Mr. Miniel has offered. Applying the reasoning used by the Fifth Circuit in this case, the omission of mitigating evidence in *Wiggins* and *Williams* could not caused any prejudice because that evidence might have lead the jury to conclude that the defendant actually presented a *greater* risk of future dangerousness. Notwithstanding, this Court found in both *Williams* and *Wiggins* that it was sufficiently likely that the presentation of the evidence would have changed the outcome of the trials in those cases and that counsel's failure to discover and present that evidence deprived the defendants of their Sixth Amendment right to counsel. Indeed, as this Court recognized in *Penry v. Lynaugh*, "[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background may be less culpable than defendants who have no such excuse." 492 U.S. 302, 319 (1989).

CONCLUSION

Accordingly, Peter J. Miniel requests that the Court grant his petition for writ of certiorari.

Dated: January 30, 2004.

GRAY, PLANT, MOOTY, MOOTY & BENNETT, P.A.

Gregory R. Merz
Counsel of Record
500 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
(612) 632-3000 (phone)
(612) 632-4444 (fax)

Attorney for Petitioner,
Peter J. Miniel